United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

75-7061

TO BE ARGUED BY
EUGENE J. MORRIS
MARTIN STUART BAKER

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

TRINITY EPISCOPAL SCHOOL CORPORATION and TRINITY HOUSING COMPANY, INC.,

Plaintiffs-Appellants,

ROLAND H. HARLEN, ALVIN C. HUDGINS and CONTINUE,

Intervening Plaintiffs-Appellants,

v.

GEORGE ROMNEY, SECRETARY OF DEPT. OF HOUSING AND URBAN DEVELOPMENT, S. WILLIAM GREEN, REGIONAL ADMINISTRATOR, DEPT. OF HOUSING AND URBAN DEVELOPMENT, U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, CHARLES URSTADT, COMMISSIONER OF HOUSING AND COMMUNITY RENEWAL, N.Y. STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, THE STATE OF NEW YORK, JOHN V. LINDSAY, ALBERT A. WALSH, HOUSING AND DEVELOPMENT ADMINISTRATION OF THE CITY OF NEW YORK, THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK, DONALD H. ELLIOTT, WALTER MCQUADE, IVAN MICHAEL, GERALD L. COLEMAN, CHESTER RAPKIN, MARTIN GALLENT, ABRAHAM D. BEAME, SANFORD D. GARELIK, PERCY E. SUTTON, ROBERT ABRAMS, SEBASTIAN LEONE, SIDNEY LEVISS, ROBERT T. CONNER and THE CITY OF NEW YORK,

Defendants-Appellees,

STRYCKER'S BAY NEIGHBORHOOD COUNCIL INC.,

Intervening Defendant-Appellee.

APPELLANTS' BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the breaches in the contracts of the appellants and other sponsors deprived them of their entitlement to a balanced integrated community in accordance with the Plan?

II. A. Did the Trial Court err as a matter of law in holding that the City's commitment, to create and maintain an integrated community by limiting the number of low income units in the Area to approximately 2500, and limiting the ratio to 70% middle income and 30% low income units in the new buildings, was not an implied provision of the written contracts, indispensable to effectuate the intention of the parties?

B. Was the Trial Court clearly erroneous in holding:

(1) that the City did not commit itself to a limit of approximately 2500 units of low income housing in the Area and to maintaining the 70%/30% ratio;

(2) that the City was not violating the approximately 2500 unit and the 70%/30% limitation or, if it was, its violations were not consequencial and would not affect its commitments to create and maintain an integrated Area;

(3) that the appellees and other sponsors did not, in fact, rely upon the City's commitment as to the number of low income units to be included in the Area and the intention to integrate the Area and, if they did, they were barred by the contract from so relying and the parol evidence rule (Mitchell v. Lath, 247 NY 377) from so testifying?

C. Was the Trial Court clearly erroneous in holding that, despite its finding that there was "substantial" evidence that conditions in the neighborhood were "deplorable", appellant failed to prove that the Area was deteriorating?

III. A. Whether the failure to consider any alternatives to the project renders the decision inadequate as a matter of law pursuant to the National Environmental Policy Act?

B. Whether this Court's holding in Conservation Society of Southern Vermont v. Secretary of Transportation, (Nos. 73-2629, 74-2168, 73-2715, December 1, 1974) and the failure to consider the cumulative effects of the project in the context of a number of decisions requires the preparation of an environmental impact statement on the whole West Side Urban Renewal Area?

C. Whether an analysis based on a narrow definition of 'environment' is adequate pursuant to the National Environmental Policy Act, and whether an environmental impact statement is required for the instant project decision?

IV. A. Was the Trial Court in error as a matter of law in holding that Otero v. New York City Housing Authority, 484 Fed 2d 1122 (2nd Circuit) dealt only with racial issues and did not encompass economic factors?

B. Was the Trial Court clearly erroneous in finding that a "pocket ghetto", within the meaning of Otero, did not exist on 91st Street where Trinity and Site 30 are located?

C. Was the Trial Court clearly erroneous in holding that the appellees did not fail in their "duty to integrate" within the meaning of Otero and in holding that the Area was in no danger of "tipping"?

V. Whether more low income units than called for in the Plan and contracts are required to take care of the legal relocatees?

VI. A. Whether the plan changes (involved in converting Sites 4 and 30 from middle to low income housing use), which were processed under Section 150 of the Public Housing Law by the City of New York, were properly processed under that section or whether they should have been processed under Article 15

The figure of 2500 was used throughout the period

(Sections 505 and 514) of the General Municipal Law and the National Housing Act of 1949 (Sections 105(a) and (d)) and was it error, as a matter of law, for the District Court to refuse to set aside the approval of the conversion of Sites 4 and 30 in light of the admittedly erroneous procedures followed?

B. Whether a written consent to the plan change was required from owners and lessees in the Pilot Project Area and did the Trial Court err as a matter of law in not setting aside the change in light of the City's concession that the required written consent was neither sought nor obtained?

STATEMENT

This is an appeal from a decision of Judge Irving Ben Cooper, United States District Court, Southern District of New York, entered on November 15, 1974, following twenty-five days of of trial over eight months, without a jury. The opinion (consisting of 122 pages) below has not yet been officially reported, and is reproduced at Appendix A 59.

This is a case dealing with abuse of governmental power and procedures. It is set in the West Side Urban Renewal Area of Manhattan, New York (the "Area"). It concerns several actions taken by the city and federal governments concerning the development of the Area.

Appellants becamse residents of the Area in reliance upon the Urban Renewal Plan, which called for the creation of stable, integrated conditions in the Area. Appellants claim that certain government decisions and procedures at issue in this case have jeopardized the stable, integrated nature of the Area. Appellants seek relief of this Court in maintaining the integrity of governmental procedures, such that the Urban Renewal Plan can be expeditiously completed, consistent with its stated purposes.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1291. The judgment of the Court below was entered on November 15, 1974. The Notice of Appeal was filed by Appellants Trinity Episcopal Schools Corporation and Trinity Housing Company on January 13, 1975; the Notice of Appeal of Appellants Karlen, Hudgins and CONTINUE was filed on January 27, 1975. Both Notices of Appeal were filed pursuant to Rule 3(a), FRAP.

Permission has been granted by the Court by order dated February 18, 1975 to appellants to file an oversized brief.

FACTS

A. THE PLAN AND ITS EXECUTION THROUGH 1969

The West Side Urban Renewal Plan ("Plan") conceived in the mid 1950's and covering the area on the West Side of Manhattan between 87th and 97th Streets and Central Park West and Amsterdam Avenue ("Area"), is still almost one third unfinished after twenty years of processing. The Plan was engineered to reverse the spreading decay in the Area and to create a new balanced community integrated racially, religiously, economically and culturally. (Plaintiffs' Exhibits 5, E 35 ; 6, E 69 8, E 87 , 203-213, 217-223, 467-476, 484, 1691, 2724)[1] The Plan was approved in 1962 (Exhibit 9, E 100) and during the period through 1969 proceeded in accordance with its original concept. Upon the investment of hundreds of millions of dollars by private interests and federal, state and municipal subsidy, most of those living in slum conditions were relocated, the old

[1] Exhibits are designated as introduced into evidence on the trial with Plaintiffs' Exhibits marked with arabic numbers and Defendants' Exhibits marked with capital letters. Numbers refer to the pages in the transcript of the testimony on the trial. There are summaries of the trial testimony, the Plaintiffs' Exhibits and the marked pleadings annexed to the plaintiffs' post trial briefs submitted to the District Court, which are included in the record upon stipulation of all counsel.

deteriorated buildings were either rehabilitated or demolished and new modern high rise buildings were built in their place, thereby reversing the process of decay which previously infected the Area. (87, 147-150, 205-213, 223, 467-475, 484, 1181, 1695-1698, 1798-1802, 2148-2162, 2307, 2308, 2316, 2317, 2425-2427, 2731, 2976-2978a, 2983, 3188)

B. DURING THIS PERIOD THE SPONSORS MADE THEIR COMMITMENTS TO THE AREA BASED ON THE CITY'S REPRESENTATIONS THAT THE AREA WOULD BE INTEGRATED RACIALLY, ECONOMICALLY, RELIGIOUSLY AND CULTURALLY

It was during this era of optimism and tangible progress that many sponsors made the commitment of time and money required to become part of this new and exciting community. Brownstones were purchased by the hundreds and a large number of sponsors made the investment required to rebuild or rehabilitate properties in the Area. It was in this atmosphere that appellants made the decision either to stay on or move into the Area. (78, 80-87, 147-150, 1286-1289, 1294, 1295, 1305, 884-859, 966-975, 982-984, 1033, 1149-1153, 1176-1180, 1214, 1215, 1695-1698, 1798-1805, 2030-2037, 2160-2162, Plaintiffs' Exhibit 57 (2135 2312, 2408-2410, 2412-2416, 2425-2426, 2975, 2981-2985, 3406, 3755-3756)

Trinity School, one of the appellants on this appeal, which was founded in 1709, is a private, independent elementary and secondary school which is non-sectarian and inter-

racial.[2]

The school is located between West 91st and West 92nd Streets, between Columbus and Amsterdam Avenues in the Area and has been at that location since 1893. It is believed to be the oldest continuous "resident" of the Area.

Because of the deterioration which had been occurring in the Area and immediately surrounding it, Trinity School was contemplating abandoning its New York facility and moving all of its operations to Pawling, Dutchess County, New York, where it already had another operating school facility. (844-846)

The City strongly desired Trinity to participate in the Plan as a "leadership" sponsor because it was the oldest and largest Area institution. City initiatives at first were rejected by Trinity because of uncertainty and complexity.

With the development of the Plan and positive changes becoming apparent in the neighborhood by the early 1960's, however, Trinity reconsidered its plans to move out of the City. In 1963 it commenced long and careful exploration of

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[2]It should be noted that the minutes of the testimony of Eliot Lumbard (844) incorrectly characterize the school as "a four-year proprietary school." This is a typographical error since Mr. Lumbard testified that the school is a "Preparatory" school. In fact it is a non-profit school and is not "proprietary" at all.

the City's proposal that it become "sponsor" of Site 24 with the private and public agencies having redevelopment jurisdiction; this was with a view toward remaining in the Area. (848-850, 855-857)

Eliot Lumbard, now a Trustee of the Trinity School and President of Trinity Housing Company, was appointed to the Ad Hoc Committee of the Board and later became its Chairman. Under the leadership of Board Chairman Glover Johnson and acting for the Trustees the Committee developed and constructed the project. Mr. Lumbard has been continuously involved with it up to the present time. (842-843)

Based on professional advice which it had obtained, it was ascertained that Trinity could feasibly become the sponsor of Site 24 (immediately adjacent to its existing school site to the east on the block front on the west side of Columbus Avenue between 91st and 92nd Streets) and develop additional school facilities along with the requisite housing above the school through a novel application of "air rights." The additional school facility would be financed with Trinity's own funds, while housing built through use of the air rights above the school could be developed as the middle income project required by the Plan for Site 24 under the provisions of the Mitchell-Lama Law (Article II of the New York Private Housing Finance Law, McKinney's

Consolidated Laws of New York, Volume 41). (848-850, 855-857, 966-987)

The government officials in charge of the Plan (Milton Mollen, Walter Fried, Jayson Nathan) with whom Trinity consulted, assured Trinity upon direct inquiry that the overall Area development would proceed and be carried to completion in accordance with the provisions of the Plan; that this would result in a redevelopment of the Area as an integrated community, with decent, safe and sanitary housing facilities and appurtenant neighborhood amenities as provided for in the Plan; and that this would result in an upgrading of the entire neighborhood in a manner consistent with the location of the expanded school facilities. Trinity was advised that there would be 2,500 units of low income housing and that new middle income buildings in the Area would be allocated on a basis of 30% low income and 70% middle income housing. (1091)

Trinity was persuaded both by the representations made by the government officials involved and by its own observations of what had occurred in the Area up to that point in furtherance of the Plan, that the interests of the school would be best served by a continuance and expansion of its facilities at its present location. Trinity's Board made a policy

determination to commit itself to the goal of an integrated Area, integrated in all respects, namely, economically, racially, ethnically and with full religious diversity.

After making this determination, Trinity proceeded in 1966 with the development, processing and construction of the project which consumed a period in excess of 6 years and involved substantial investment of Trinity's funds, on an equity as well as a front or seed money basis at high risk, to bring the project to the point of approval for financing under the provisions of the Mitchell-Lama Law. After the financing was approved in 1968, the project was built and rented on the basis of 30% of the tenants in the building being low income families with the remainder being moderate or middle income families and a clause to that effect was inserted in Trinity's contract (Exhibit 14,E 157) providing as follows:

> "It is hereby agreed that 30% of the apartments in the apartment building to be constructed will be allocated to families of lower income than the income of families occupying the remainder of apartments by any one or more of the following means as determined by HDA:...." (E-174)

The development, construction, ownership and operation of the property were all performed in accordance with the provisions of the agreement between the City of New York and

Trinity Episcopal Schools Corporation dated June 20, 1968 (Exhibit 14, E 157) which contains the Disposition Agreement under Title I of the National Housing Act and as Exhibits, the Urban Renewal Contract between the City of New York and the Federal Government, the Urban Renewal Contract between the City and the State, the Schedule of Relocation Allowances, the Urban Renewal Plan, the Project Plan and the Pilot Project Plan. All of these documents spell out the details of the plan and the basic concept of how the entire Area was to be redeveloped (Exhibit 14, E 157).

Under the Final Plan approved by the Board of Estimate on June 26, 1962 (Exhibits 1, E 1 , 8, E 87 , 9, E 100 , 10, E 102 , 14, E 157) the Area was designated as a "deteriorating area" and the Plan was characterized as "a general plan to upgrade and stabilize the deteriorating neighborhood" and is "directed towards the creation of an entirely new neighborhood and environment. ..." The old deteriorating Area was to be destroyed and something new and better was the goal toward which the Plan was to strive.

During this period from 1962 through 1969, in addition to a large number of new projects, hundreds of brownstones were sold to individual owners and large sums were spent in

acquiring and rehabilitating them. (Exhibit 57, E 678 , (2135-2139, 2148-2151, 2160-2162))

Typical of the situation which existed as to the brownstones was the acquisition of 34 West 94th Street in the "Pilot Project Area" by appellant-intervenor Roland N. Karlen on July 18, 1969. (73, 85, 115, 116, 2617-2622) The Pilot Area was to be developed as the ideal for rehabilitation of decaying existing structures which could still be salvaged. Strong efforts were made by City officials to induce the initial participants into making the substantial capital investments involved in rehabilitating the old brownstones, and moving their families into the Area.

Karlen purchased his home from the City and covenanted to abide by the terms of the Urban Renewal Plan for the Pilot Project Area. (Exhibit 14, E157) Not only was he bound to follow the plan as promulgated, but also restrictions were placed upon the physical appearance and use of his home.

In his search for a suitable home for himself and his family, he was shown literature prepared by the Housing and Redevelopment Board of the City of New York for those who wanted to buy City-owned brownstones, which included a map of the Area. (Exhibits 10, E 102 , and 13, E 127) That map showed

that the Area was being redeveloped as a modern community integrated along racial, economic, ethnic and religious lines. At the time he was interested and did purchase his home from the City he spoke with William C. Hunter, Field Director of the Area, and Joseph Lauria, Mortgage Consultant on the project. (78, 80-85, 87)

Based upon his observation of what was happening in the Area, the representations made by the officials of the City and the literature and brochures furnished to him as well as the provisions of the Plan itself, Karlen acquired 34 West 94th Street and rehabilitated it for himself and his family along with six apartments for rental. The total expenditure for acquisition and rehabilitation was $148,800. (85, 115, 116) He moved into the property and has lived there with his family since that time. (86)

Appellant-Intervenor Alvin C. Hudgins (who is black) also, based upon the same representations Karlen had received and upon the provisions of the Plan, contracted to purchase a brownstone in the Pilot Area at 29 West 94th Street on February 11, 1971, in which he resides, along with the adjacent brownstone at 27 West 94th Street. (Exhibits 35, E545 , 35A, E553 , 36, E 621 , 36A, E 633). He rehabilitated these buildings at a total cost for acquisition and rehabilitation of $265,000. (1216)

He moved from a segregated area of Queens in order to live in the integrated West Side Urban Renewal Area. (1171-1180)

A large number of other sponsors who are represented by appellant-intervenor CONTINUE[3] made similar investments in the Area based upon similar observations and representations. All of them were led to believe they could rely upon the Plan for the upgrading of the Area and that it would not be changed in any essential respect.

C. THE COMMITMENT TO 2500 UNITS OF LOW INCOME HOUSING AND A 70%:30% RATIO OF MIDDLE TO LOW INCOME HOUSING

A meeting occurred at about the time the plan was approved with the Mayor, the Deputy Mayor, the Housing and Development Board and Commissioner Badillo at which it was agreed to increase the number of low income units to 2500 and an announcement to that effect was made by the Mayor. (Exhibit H, E 1086) This figure of 2500 low income units was repeated

[3] The Trial Court at pp.4, 23 of its opinion indicates that the CONTINUE group consists primarily of brownstone home owners. This is not so. Although there are some brownstone owners among them it includes many tenants and cooperators in high rise buildings.

subsequently on a number of occasions by various City officials as one of the objectives of the Plan (Exhibits F, E 1080 , I, E1089 , J, E1093 , 2, E16 , 3, E23 , 4, E31) and was accepted as the basis for the economic mix of residents in the Area. It was told to all who inquired as to the objectives of the Plan although the figure itself was not included as part of the formal printed Urban Renewal Plan itself. It was arrived at on the basis of reasonable estimates of the number of low income units required to take care of the legal relocatees.

The 2500 units included the 7 public housing projects to be built in the Area and on the perimeter as follows: 120 West 94th Street, 70 units; 74 West 92nd Street, 168 units; Stephen Wise Towers, 399 units; 589 Amsterdam Avenue, 158 units (Exhibit S, E 1124) and DeHostos, 223 units; 830 Amsterdam Avenue, 159 units and Douglass Addition, 135 units, totalling 1312 units (Exhibit 45, E 650) (574,575) along with the two public housing rehabilitation projects totalling 276 units (Exhibit S, E 1124)

In addition there was to be internal integration in each of the new middle income buildings on a 70%:30% ratio amounting to 853 units by the use of a number of techniques

for subsidizing the lower rents. (Exhibit 14, E157)

The figure of 2500 was used throughout the period from 1962 until 1970 as the optimum number of low income units for the Area. It was not intended as a minimum or a maximum but as an objective to be reached. Indeed some of the statements showed 2465 and others showed 2556 but the general figure of 2500 was understood by all concerned to apply during that period. The 70%:30% ratio started out as an 80%:20% ratio but that was changed before appellants became sponsers. (Exhibits 1, E1, 3, E23, 4, E31, 65, E745, G1081, S, E1124, 220, 498-506, 574-581, 1010-1014, 1091, 1260-1262, 1280, 1350-1351)

The provisions of the Plan to create an integrated community through the diverse income groups provided for, with a limitation of approximately 2500 units of low income housing and a 70%:30% ratio in the new buildings, were relied upon by the sponsors of both new housing and rehabilitation projects as the touchstone for integrating the entire Area and in effect became part of the commitment by the City to all sponsors.

Each of the witnesses called by appellants testified that they were told that one of the objectives of the Plan was to integrate the Area economically, ethnically, racially and religiously when they made their commitment to stay in or move into the Area and to make a financial investment in it.

D. BEGINNING IN 1970 THE AREA BEGAN TO DETERIORATE IN A MANNER WHICH WILL EVENTUALLY LEAD TO ITS BECOMING A SEGREGATED GHETTO

In 1970, however, a change occurred and all of the progress made in the preceding eight years began to be reversed. This change was triggered by the illegal entry into an unfinished section of the Area of a large group of squatters who forcibly took possession of a number of buildings (which had previously been vacated and were ready for demolition) and refused to vacate. The squatters entry was instigated by a group of radicals and the City did nothing about it because of political pressures exerted on it by these radical groups. Up to the time of trial 284 of these squatters were still on the site. (225-228, 1306-1311, 2318-2320, 3170-3172, 3184-3185, Exhibit S, E 1124) This was followed by the City mandating a large number of welfare families to move into the new buildings (230, 231, 254-257, 3362, Exhibits 46, E 651 , 54, E 673 , and S, E 1124) and by the plan to increase beyond the Plan's contemplation the number of low income public housing units by converting Sites 4 and 30 from middle to low income housing. (Exhibits 23, E 508 , 24, E 515 , 25, E 519 , 26, E 525 , 27, E 536 , 28, E 537 , Exhibit B, E 865 , attached documents "k" and "l".) These actions, combined with the

infusion of a large number of low income families into the new housing as a result of the federal Section 236 subsidy, resulted in the rapid deterioration of the Area which was extensively testified to on the trial by many witnesses and which is leading to the Area becoming a segregated ghetto. (See pp42-46 above

E. THE INSTITUTION OF THIS ACTION

When the Area began to deteriorate anew the sponsors in the Area actively opposed the City's violations of the Plan and the breach of their contracts. (163-168, 2991-3006, 3016-3021) Their actions culminated in the institution of this suit seeking injunctive relief to bar the City from breaching the contracts.

F. THE RESPECTS IN WHICH THE PLAN HAS BEEN VIOLATED BY APPELLEES

Although characterized by the District Court as being an action solely to bar the conversion of Site 30 from middle to low income housing, this case is about many other wrongs committed by the government in breach of the contracts. These include:-

1. Failure to complete the Plan within a reasonable time.

2. Allowing illegal site occupants (squatters) to come into the Area admittedly illegally and stay there with legitimized status so that there are still 274 squatter families on the site.

3. Converting Sites 4 and 30 from middle to low income housing in violation of the basic purpose of the Plan.

4. Failing to effectuate a formal plan change on the conversion of Sites 4 and 30 and failure to obtain the written consent to the change from owners and lessees in the Pilot Project Area as contractually required.

5. Allowing more than 2500 units of low income housing to be included in the Area and its environs in violation of the contract and permitting plans for the future development of the project to exceed the 2500 units of low income housing.

6. Violating the provisions for a 70% middle income and 30% low income ratio in several buildings by allowing welfare families to come into the 70% middle income portion and employing Section 236 subsidy where the income limits are approximately equal to public housing limits. This 236 subsidy is also planned for all future buildings to be built into the Area and include the larger units for low income families and smaller units for middle income families thereby further increasing the number of low income people in the Area.

7. Allowing a concentration of low income families to occur on 91st Street (the Trinity block), which includes Site 30 as public housing, amounting to over 80% of the total number of units on 91st Street, thus creating a "pocket ghetto" immediately around the Trinity School.

8. Failing to comply with the environmental and civil rights laws.

9. Allowing the Area to deteriorate in breach of the contract provision to maintain an integrated area.

G. THE RELIEF SOUGHT

Specifically the relief sought from the Court below was as follows:

1. An order reinstating the lawful designation of the use of Sites 30 and 4 as middle income housing and permanently enjoining the construction of low income public housing on Sites 30 and 4.

2. An order directing the specific performance of the Plan which was incorporated into the contracts entered into by plaintiffs with defendant, City of New York providing for a limit of approximately 2500 units of low income housing, a ratio of 70% middle income and 30% low income housing in the new buildings and creating and maintaining an integrated community.

3. An order directing that illegal site occupants (squatters) be removed from the West Side Urban Renewal Area as unlawful and inconsistent with the Plan.

4. An order that designated new middle income buildings be returned to a 70% middle income - 30% low income mixture, as agreed upon between the respective developers and defendant, City of New York.

5. An order permanently enjoining the Federal commitment of funds to public housing at Site 30 because the National Environmental

Policy Act of 1969 has not been complied with and because the environmental quality of the Area is in such jeopardy that the National Environmental policy could not be fulfilled legally and would not be served by such Federal action.

6. An order by the Court retaining jurisdiction over the completion of the Plan in accordance with its legally constituted terms and appointment by the Court of a Special Master to oversee all continuing and further development in the Area, all of which is to be in accordance with the Plan; the said Special Master to have jurisdiction and supervision of all aspects of the execution of the Plan until its completion.[4]

Appellants now seek an order of this Court reversing the Trial Court and remanding for an order consistent with these points.

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[4]A request was also made for costs and attorneys' fees. The Trial Court reserved decision on the request and directed that a separate application for this relief be made. The motion for such relief is returnable before the Trial Court on March 20, 1975.

POINT I

THE ESSENTIAL BREACH OF CONTRACT INVOLVED ON THIS APPEAL HAS THE EFFECT OF DEPRIVING APPELLANTS OF THEIR RIGHT TO AN INTEGRATED BALANCED COMMUNITY

Appellants and the other sponsors as citizens contracted in good faith with their government to enter into a partnership for the redevelopment of the Area in accordance with the Plan as an integrated community.

The government has, since 1970, breached those contracts by a number of serious departures from the basic concept to renew the Area into a balanced community. These breaches have led to a deterioration of the Area, reversing the improvement which occurred prior to 1970, and are leading inexorably towards making it a segregated slum.

Appellants and the other sponsors made what was frequently the largest investments of their lives both in money and in their way of life in reliance upon the commitment of the government to redevelop the Area as promised. They now find themselves, as a result of the faithlessness of their government, trapped

in an Area under unliveable conditions, totally in violation of the agreements they thought would protect them.

Goaded to a point of unendurability, after using every other device to stem the erosion of the Plan, they were left with no alternative but to seek relief from the Courts.

This is the framework within which the following discussion of the breaches of contract must be viewed.

POINT II

BY EXCEEDING THE NUMBER OF LOW INCOME UNITS AND CAUSING THE AREA TO DETERIORATE INTO A SEGREGATED SLUM THE CITY BREACHED THE CONTRACTS OF APPELLANTS AND OTHERS SIMILARLY SITUATED IN THE AREA AND THE TRIAL COURT'S REFUSAL TO ACT TO REMEDY THE SITUATION SHOULD BE REVERSED.

A. THE WRITTEN CONTRACT CONTAINS AS AN IMPLIED PROVISION, INDISPENSIBLE TO EFFECTUATE THE INTENTION OF THE PARTIES, THE REQUIREMENTS FOR A LIMITATION OF APPROXIMATELY 2,500 UNITS OF LOW INCOME HOUSING, THE 70%:30% RATIO OF MIDDLE TO LOW INCOME HOUSING AND THE COMMITMENT TO AN INTEGRATED COMMUNITY.

The figures of 2,500 units and the 70%:30%

ratio (discussed at pp 10-12 above) and the commitment to create and maintain an integrated community, in effect, became engrafted into the various agreements being made by the City with sponsors and other persons making a commitment to the Area under the terms of the Plan and became a binding obligation of the City to perform. The 70%:30% provision was expressed in the Contract but the other provisions, although not expressed in haec verba were equally binding.

The law is clear that these provisions are enforceable as part of the contract. A contract includes not only the terms set forth in express words, but all implied provisions indispensible to effectuate the intention of the parties in carrying out the contract.

It is a well-established principle that an implied term is as enforceable as an express term. As far back as Grossman v. Schenker, 206 N.Y. 466, 469 (1912), it has been recognized that "What is implied in an express contract is as much a part of it as what is expressed ... " This principle has been cited and followed in Fellows v. Fairbanks, 205 A.D. 271, 199 N.Y.S. 772, 775 (1923); Cullen Fuel Co. Inc. v.

W.E. Hedger, Inc., 290 U.S. 82, 88 (1933); and many other cases in both the state and federal systems.

Generally, a term will be implied when: (1) it is not inconsistent with the express terms of the contract; and (2) when there arises from the language of the contract and the surrounding circumstances an inference that the introduction of the implied term is necessary to effectuate the intention of the parties. 11 Williston on Contracts §1295 (3rd ed. 1968); Murray v. City of New York, 165 Misc. 125, 300 N.Y.S. 425, 428 (aff'd. 252 A.D. 853, 300 N.Y.S. 430 (First Dept., 1937); Suburban Club of Larkfield v. Town of Huntingtor 56 Misc.2d 715, 289 N.Y.S. 2d 813, modified 30 A.D. 2d 541, 291 N.Y.S. 2d 1013 (modification not relevant).

In Trinity the intention of the parties to the site-sponsor contracts was to create and maintain an ethnically and economically balanced community. To effectuate this intent a covenant to maintain the number of low income units available at approximately 2500 and the maintenance of the 70%:30% ratio must be read into the contract and public hearings and official

statements may be considered the surrounding circumstances from which the intent of the parties and necessary implied terms may be supplied. In Trinity many statements were made by officials in the press, at public hearings and privately setting forth the objectives of the plan to create a balanced, integrated community.

More specifically the court will always imply a covenant to do nothing to impair the rights of a party to the agreement and to refrain from conduct which destroys the rights of the other party to receive the fruits of the contract. Kaminsky v. Kahn, 13 A.D. 2d 143, 213 N.Y.S. 2d 786 (First Dept., 1961); Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

The courts have also implied a term of reasonable duration where a contract has been indefinite as to time. Hammond v. C.I.T. Financial Corp., 203 F.2d 705 (2nd Cir., 1953); Rochester Park, Inc. v. City of Rochester, 38 Misc.2d 714, 238 N.Y.S.2d 822 (1963), aff'd. 19 A.D.2d 776 (4th Dept., 1963), (an urban renewal case).

In addition, the court stated in Rochester Park supra (at p826) that there is an implied obligation to cooperate in furtherance of the purpose of the Plan: "It is fundamental in the law of contracts that a bilateral contract invariably contains an implied and inherent requirement on both parties to cooperate with each other in achieving the aims of the agreement."

The purpose of the contract between the plaintiffs in Trinity and the City was to further the purpose of the Plan, i.e., the creation and maintenance of a viable integrated community. Although the contract itself did not specify the distribution of units at various economic levels essential to the maintenance of a balanced community, the court should imply those terms which were established by the Plan as conditions of the contract.

Considered specifically appellant Trinity relied upon this commitment by the City in that one of the reasons for making the decision to remain in the Area and not move its school to Pawling was the commitment by the City that the Area would be redeveloped on an economically integrated basis. The

essential ingredient of a successful and firmly integrated community is observance of the commitment for approximately 2500 units of low income housing since the Area would not remain integrated if that number were exceeded because the tipping point would be passed and the Area would eventually become segregated. It was on this representation along with the 70%:30% ratio fixed in its contract that Trinity invested almost $9 million to stay in the Area. (972-975)

Appellant-Intervenors Karlen and Hudgins relied on the same commitments in purchasing and rehabilitating their brownstones.

The members of CONTINUE who testified on the trial, who likewise relied upon the City's commitment in buying and rehabilitating brownstones in the Area at great cost were Dr. Jerome Fine (136, 137), Lisa Liebert (1787, 1788, 1796, 1797, 1815), Mrs. Dina Sours (2304, 2312) and Mr. Paul Friedberg (2408-2410).

The tenant-cooperator Miles Owen also relied upon the City's commitment in moving into the Area and purchasing his co-operative apartment. (2555)

The cumulative testimony of these witnesses

establishes that the appellants relied upon these commitments and this becomes conclusive when we realize that there was no evidence adduced by appellees to the contrary.

B. THE CITY VIOLATED THE TERMS OF THE CONTRACTS BY ALLOWING THE SQUATTERS AND WELFARE FAMILIES TO COME INTO THE AREA AND ALLOWING THE 2500 UNITS AND 70%:30% RATIO TO BE SUBSTANTIALLY BREACHED.

In the spring of 1970 a group of squatters, (as part of an organized movement under the leadership of William Price for Operation Move-In (OMI) and El Comité supported by Strycker's Bay (1320-1321, 1819-1820) moved into vacant apartments in a number of old tenement buildings which were slated for demolition and which had been recently vacated by the prior site occupants who were relocated by the City. The City failed to take action to remove them from their illegal occupancy and in fact gave them rental agreements permitting them to stay on. There has been a rapid turnover in these tenancies with constant move-outs and move-ins. The living conditions in these apartments are deplorable and they are not fit for human habitation. However to the day of trial more than four years after

of the contract there are no specific provisions excluding

their illegal takeover, there were 274 squatter families still living in the Area. (Letter of the Corporation Counsel to the Court dated May 28, 1974, p.2) These families are all low income and a large number of them are on welfare. They constitute a disruptive element to the entire neighborhood. (1306-1310, 1311, 2591-2)

The act of the City in permitting these squatters to remain on the site is in violation of the City's commitment to the sponsors under the terms of the Plan because they not only constitute a disruptive element in the community but their occupancy of buildings which should be demolished to make way for new buildings, as called for in the Plan, serves to delay the progress and completion of the Plan. (3170,3171,3184-5)

In addition the City and Strycker's Bay have tenanted the 70% middle income portions of Leader House, Westwood House and Columbus Manor with welfare families so that the buildings have ended up with 40% middle income and 60% low income families. (1429-1439, 2018-2022) This is concededly in violation of the City's commitments as evidenced by the letter of the HDA Administrator Andrew Kerr of January 8th, 1973 (Exhibit

64 E744) who characterized these occupancies as in violation of the City's commitment.

The Trial Court has conceded that the 70%:30% ratio has been exceeded by admitting additional welfare families in at least three buildings and by the continuance of the squatters on the site but held that it was contemplated that both of these violations would be corrected in the future and therefore it took no action with respect to these patent breaches of the contracts. Bearing in mind that the 70%:30% ratio was expressly incorporated in the Trinity contract (as quoted at p. 6 above) it was incumbent upon the District Court to, at least, enjoin these wrongs. It is no answer to say that these violations would be corrected by administrative action since there was no testimony that they would be and the probabilities are that the City, in view of its overall disregard for the future of the Area and its demonstrated responsiveness to political pressure for more low income familites, will not take action to correct the situation. Shannon v. United States Department of Housing and Urban Development, 436 F.2d 809 (3d cir.

1970); Blackshear Residents' Organization v. Housing Authority of the City of Austin, 347 F. Supp. 1138 (W.D. Tex. 1971); Banks v. Perle, 341 F. Supp. 1175 (N.D. Ohio 1972); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971).

Moreover, the balance of these three buildings are occupied by Section 236 subsidized tenants whose income limits are approximately the same as current public housing limits and are suitable only for what is the equivalent of low income occupancy. There are a total of approximately 600 Section 236 tenan's in these buildings.

Thus, when we add the 274 squatter families and the 600 Section 236 tenants in these three buildings to the low income units already built in the seven public housing projects totaling 1312 low income units plus the 276 units of rehabilitated public housing and the 853 units of low income housing in the middle income buildings we have a grand total of over 3300 low income families presently in occupancy. (Exhibit S, E1124) (Exhibit 45, E650)

This is clearly in violation of the 2500

units and the 70%:30% ratio the City committed itself to create in the project.

The City has also failed to proceed with the completion of the Plan four years after the 1970 date which was the estimated completion date. (1290-1291, Exhibit 14, E157p. 28 Par. 11 which states that the Plan will be completed in 8 years from the date of execution, July 1962)

These figures must be viewed within the framework of the change in the processing requirements for public housing tenants where the prior careful screening engaged in by the Housing Authority has been eliminated and it is much more possible for multi-problem families to be admitted into public housing projects. (230-232, 779-786, 3814, 3815)

Moreover, the larger apartments have been allocated to low income families thus increasing the population of the low income persons.

If the City completes the Plan as presently contemplated it will eliminate the 274 squatter families presently on the site and will add 136 low income units presently in construction plus 539 units of low income

to be included in the new middle income buildings to be constructed, along with Sites 4 and 30 as public housing, making a net difference of 401 additional units which when added to the 3300 units presently on the site will make a total of 3700 units of low income housing over and above any new low income housing that results from using Section 236 (or the new Federal Section 23 leasing program, now Section 8 under the Federal Housing and Community Development Act of 1974) which might be used in the 6 new buildings to be constructed by the State and the 2 new buildings to be completed by the City. (Exhibit S, E1124 Exhibit 45, E650)

In excess of 3700 units clearly violates the City's commitment of 2500 units of low income housing.

The Trial Court at pages 37-42 of its opinion makes the clear finding that the overriding objective of the Plan is "to create a racially and economically integrated community" (p. 37)and has "the objective of maintaining economic integration."(p. 39)

It also finds that "a critical issue here is the City's announced policy to provide 2500 units of low income housing. A parallel issue is the City's

policy of maintaining a 70%;30% ratio of middle to low income units in middle-income buildings in the Area."(p.37)

The Court then finds that "no legal or binding commitment by the City was intended; the 2500 figure was instead a statement of policy and intention." (p.37) and "that the 70%:30% ratio was never intended as an irrevocable commitment binding upon the City."(p. 42)

The Trial Court did not find that the City was not violating the 70:30 ratio (it clearly could not so find because the proof that it had happened was clear and uncontroverted), but instead found that appellants had failed to establish "by proof clear and convincing"(p.42)that "such an increase would endanger the integration of the Area and therefore the underlying purpose of the Plan."(pp 41, 42.)

In so holding, the Trial Court's conclusion was "clearly erroneous" because appellants did establish by overwhelming and conclusive proof that the Area has been deteriorating since 1970 after the squatters and the excessive welfare and low income families came and that the violation would threaten the integration of the Area and consequently the underlying purpose

of the Plan. (see pp. 6-8 above)

The Trial Court held (pp. 43-50)of the opinion that the City never made a commitment to a fixed number or percentage of low-income units; it held that the figures were estimates that would inevitably change and were not binding "so long as such change did not threaten the Plan's objective". p. 50.

However, as we have shown above, pp. 6-8 the City did make a commitment to the creation of an economically and racially integrated neighborhood (which the Trial Court concedes in its opinion at pp. 37, 39 was the intention of the Plan) and that one of the essential devices for accomplishing this was the controls it imposed on the number of units in each income category. In changing these controls radically as the City has done since 1970, it has "threatened the Plan's objective" (Trial Court's opinion p. 50) and consequently modified the Plan in an essential aspect which is clearly erroneous and amounts to a breach of contract.

The Trial Court's finding at p.37 that the 2500 units was a "political" decision calculated to

take care of the relocatees does not change the fact that the representation was, in fact, made and was acted upon by the sponsors, who in reliance upon it expended large sums of money and stayed or came into the Area for their permanent homes. Thus, the City is estopped from any change in this respect. See e.g., Planet Court Corp. v. Board of Education of the City of New York, 7 N.Y. 2d 381, 38 (1960); St. Vincent's Orphan Asylum v. Madison-Warren Corp., 225 App. Div. 379 (4th Dist. 1929)

An analysis of the Trial Court's opinion establishes that it equated low and middle income occupants as being equal in sociological terms and it was able to dismiss, with a wave of the hand, the inordinate number of low income families resulting from the squatters, the excess welfare families and the large numbers by which low income families exceed the 2500 and 70%:30% limitations.

The concept enunciated by the Trial Court, in effect, holds (at pp. 45-48 of the opinion) that the City was free at any time to change the Plan in any manner and could not be held accountable to parties

relying on it to their detriment. This is a surprising conception for a Court to rely on with respect to a Government "partnership" with its citizens. In fact it appears that the Government housing officials simply were to be free to do as they saw fit, untrammeled by any rights the parties with whom they contract may have.

To state the proposition is to resolve it, since the law will not allow a contracting party to absolve itself in advance for any breach of contract that may occur. The City is bound by the terms of its contract just as any other contracting party would be and the contract clauses which authorize changes are clearly intended to cover mechanical and inconsequential changes only. They certainly cannot contemplate changes so profound (as the ones challenged in this action) that their inevitable effect would be to undermine the entire contract.

Moreover, the City-sponsor contracts are boilerplate, printed agreements consisting of many hundreds of single spaced pages as to which little or no negotiations occur (see Exhibit 14, E157 for example). They are delivered as a package to all sponsors on a

take it or leave it basis. Thus, any clause authorizing changes must necessarily refer to trivial or minor modifications and cannot be held to bar appellants' testimony dealing with so profound a provision as the intention to create and maintain an integrated Area by limiting the number of low income families called for in the Plan. Tobin v. Union News Co., 18 App. Div. 2d. 243 (4th Dep't, 1962) aff'd 13 N.Y. 2d. 1155 (1964); O'Connor-Sullivan Inc. v. Otto, 283 App. Div. 269 (3d Dep't, 1954).

The Trial Court at p.46 of its opinion refers to the parol evidence rule (citing Mitchell v. Lath, 247 N.Y. 377) as a bar to the testimony to the effect that there was an oral promise by the City that it would not modify the Plan, holding that "they amount to prior negotiations that are inconsistent with an express provision of a written contract and [are] therefore barred by the parol evidence rule."

The cases cited in the opinion do not bar the testimony.

All of the circumstances concerning the development of the Area are interrelated and inter-

woven with the agreements, albeit they are collateral to them and the three criteria set up in Mitchell are met. Those critera are:

> "(1) The agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that the parties would not ordinarily be expected to embody in the writing ..."

The testimony introduced into evidence on the trial meets squarely each of these criteria.

(1) The testimony that the community was to be integrated ethnically, economically and racially (by limiting the number of low income families to 2500 units based upon a fixed number of public housing units and a ratio of 30% low income units to 70% middle income units in the new buildings) induced Trinity and the other sponsors to remain in the community. That testimony was separate and apart from the specific provisions of the Urban Renewal Plan and Exhibit 14, E157 and consequently was collateral to it. Many elements of the extended discussions and negotiations, (covering a period of many years) leading to the execution by appellants and others similarly situated of their agreements, were represented to appellants by the City

to be the City's concept for the development of the community and were relied upon by the parties as being their mutual understanding of the agreements and the manner of their performance. These discussions and negotiations constitute agreements collateral in form.

(2) The testimony in question does not contradict either the express or implied provisions of the agreement. Indeed, it is fully consistent with those provisions since the written contract provides for the creation of a renewed, integrated community and the testimony established that the City represented that it would do everything necessary to accomplish that result. Thus there is not only no contradiction of the terms of the written contract, but the oral representations were designed to fashion the details of an approach to effectuate the objective of a renewed integrated community. They were fully consistent with each other -- both having as their objective the avoidance of a situation where the Area would become, over a period of time, a segregated community.

(3) The testimony as to the details of how the City contemplated it would redevelop the Area, such

was required, the Court cites the New York City Housing

as the economic mix of occupants of the new and rehabilitated housing, were not ones that would ordinarily be expected to be embodied in the writing since they represent the details as to how the concept of an integrated community would be created. The writing did specify use designations for the various sites in the area but did not, and would not be expected to, delineate the overall number of low income units or the distribution of those units over the Area, nor did it set forth any of the other details as to how a balanced community was to be maintained.

In Trinity, the oral testimony deals with the details of how the plan for an integrated community are to be realized in a manner fully consistent with the express and implied provisions of the writing.

The merger clause (¶110 of the contract) quoted at page 47 of the District Court's opinion does not preclude reliance upon oral representations.

The Trial Court erroneously held that a "general merger clause", such as Section 110 of the contracts between purchasers of brownstones and the City precludes the use of parol evidence to establish a breach

of contract. Each of the cases cited by the Court squarely stands for the proposition that a general merger clause does not specifically exclude reliance upon oral representations.

In Fogelson v. Rackfay Construction Co., 300 N.Y. 334, 338 (1950), the court recognizes the principle that the rule forbidding the introduction of proof of an oral agreement to add to a contract does not apply where it is not so clearly connected with the transaction as to be "part and parcel of it"; and that the test is whether the parties would have ordinarily embodied such an agreement in writing. Therefore, it is doubtful that the parties in Trinity would have embodied in writing a term to cooperate to create a balanced community.

Where the merger clause explicitly excludes oral representations regarding a particular subject, reliance upon oral representations regarding that particular subject are excluded. See Danann Realty Corp. v. Harris, 5 N. Y. 2d 317 (1959); Cohen v. Cohen, 1 A.D. 2d 586, 151 N.Y.S. 2d 949 (1956). In Section 110

is required to consider these cumulative impacts.

of the contract there are no specific provisions excluding reliance upon representations made regarding the plans for the economic and racial composition of the Area (indeed, the District Court held that the overriding objective of the Plan was "to create a racially and economically integrated community" p. 37) and therefore the cases cited by the Trial Court are not applicable.

In Hamilton Life Insurance Co. of New York v. Republic National Life Insurance Co., 291 F. Supp. 236 (S.D.N.Y. 1968) and in Jones Memorial Trust v. T.S.A.I. Investment Services, 367 F. Supp. 499 (S.D.N.Y. 1973), the court excluded evidence of an oral agreement which would contradict express or implied provisions of the contract. Here there is no inconsistency between the express provisions of the contract and the oral representations contained in Appellants' testimony.

As there is absolutely no mention in the written contracts of the desired racial and economic composition of the Area, Appellants may base their claim on oral representations made by Appellees regarding such facets of the Plan because: (i) a general merger clause does not preclude plaintiffs' reliance on oral representations that are not a part of the contract; (ii) there is no specific provision in the merger clause excluding reliance on representations regarding the racial and

economic composition of the Area; and (iii) such representations in no way contradict other oral contract provisions.

Thus, it is clear that Appellants are entitled to rely upon oral representations despite the existence of the merger clause (Section 110).

The Trial Court likewise erred at p. 48 of the opinion in stating that, even in the absence of a merger clause, the provisions of Section 405 would cause Section F (the changes clause in the Plan quoted at p. 52 of the opinion) to govern and would exclude "reliance upon alleged prior representations as implying a contemporaneous agreement which could not be modified." But the "contemporaneous agreement" discussed herein is not inconsistent in any way with the provisions of the contracts and the Plan and consequently Section 405 does not exclude "reliance upon alleged prior representations."

At p. 49 and 50 of the opinion the Trial Court holds that the City employees with whom appellants dealt were not authorized to bind the City and "that acts or statements by City employees beyond the scope of their authority are not binding on the City" citing cases. However, the employees of the City, who are mentioned, are Mollen, Hunter and Luria all of whom were designated to represent the City with respect to the Project to the

public; Mollen as Chairman of the Housing and Redevelopment Board, and Hunter and Luria as site office representatives. They were the only City people who sponsors could deal with and they were so held out to the public with apparent authority to act. The Trial Court's holding would seem to be that sponsors had no right to rely on anyone but the Mayor himself.

C. THE TESTIMONY IN THE RECORD DEMONSTRATES THAT THE AREA IS DETERIORATING.

The record is replete with testimony of the deterioration of the Area since the advent of the squatters in the Spring of 1970. We have digested the testimony of Plaintiffs' witnesses (Exhibit B annexed to the Plaintiffs' Post Trial Brief included in the Record on Appeal) who testified to the facts regarding this deterioration and it will not be repeated herein. The witnesses who so testified are: Karlen (71-133, 2614-2628); Fine (133-170, 1285-1371, 1480-1548): Hudgins (1169-1285); Bromberg (1376-1477, 1549-1641); Garcia (1642-1663, 1673-1680); Liebert (1784-1989, 2038-2045); Olnek (1994-2027, 2045-21280; Roth (2242-2253); Sifonte (1666-1673, 2257-2295); Sours (2304-2334, 2357-2399); Friedberg (2400-2460, 2755-2796); Owens (2553-2613); Gratz (2971-3076).

In summary, this testimony may be categorized into the following general areas:

(a) Crime in the form of dope trafficking, muggings, attempted rape, assaults, murder, prostitution, burglary, robbery. (90, 91, 100, 1310, 1028-1029, 1217-1220, 1448-1452, 1652, 1655, 1850-1852, 2059-2063, 2120, 2257-2266, 2271-2272, 2318-2320, 2324-2325, 3007, 3012-3013)

(b) Juvenile delinquency and destruction of property. (88)

(c) Graffiti inside halls and stairs and on the exterior of buildings. (94, 114, 129-130, 1223, 1440, 1444-1448, 1647-1648, 1702, 2058, 2282-2283)

(d) Congregating and loitering in front of buildings. (1217, 1440-1444, 1457-1460, 2273-2274)

(e) Noise from parties, fights, fire-crackers, bugles, tamborines, bongo drums, shouting and yelling, loud playing of radios, TV and hi-fi equipment all going on until the early hours of the morning. (1653, 1654, 1656, 1657, 1658, 1850-1852, 1854, 2248, 2267-2270, 2327-2329, 2436-2445)

(f) Drinking of beer, wine and liquor and a prevalence of derelicts and drunks.

(101, 1222, 2267-2270, 2326)

(g) Breaking glass, throwing rocks, bottles and firecrackers, shooting bee bee guns, breaking windows. (88, 1314, 1318-1319, 2324-2325)

(h) Garbage strewn about the streets, accumulating in buildings, thrown out of windows, garbage receptacles dumped into the streets, urine and feces in halls. (1311-1317, 1546, 1440-1444, 1648, 1646, 1651, 1830-1831, 1854, 2058, 2248-2250, 2275, 2287, 2318-2320)

(i) Illegally turning on water hydrants and shooting water at passing cars. (1850-1852, 1854, 2330, 2558)

(j) Calling vile epithets and obscene language at passers-by, threatening language and accosting people on the street. (2321-2322, 3012-3015)

(k) Starting fires. (1314-1318, 1661, 1832, 2559-2561, 3012-3013)

(l) Vandalism in schools, garages and buildings. (1311, 1656-1657, 1659-1660, 1662-1663, 1702-1709, 2250, 2606-2608, 3008-3009)

(m) Dope addiction. (1222, 2267-2270, 2326, 2559-2561)

(n) Fear of the neighborhood. (1311, 1820-1823, 2136-2138, 3119)

(o) Infestation of rats, mice, roaches and other vermin. (1314-1317, 1541-1542, 1649, 1650, 2278-2282, 2316-2317)

(p) Creation of neighborhood tensions. (1823-1825, 1828, 1829, 1910-1915, 2380, 2428-2435, 2445-2446, 2986, 3000-3002, 3018-3021)

(q) Throwing articles and material off terraces. (1453-1456 Plaintiffs' Exhibit 42)

(r) Squatters taking over vacated buildings. (1306-1310, 1819, 1820, 1826-1827, 2318-2320, 2428-2431, 2591-2592. 2993. 3007)

(s) Illegal car repairs on street. (1830-1831)

(t) Necessity to hire guards on streets. (1847-1852)

(u) Stripping cars. (2558-2561)

(v) Education in the public schools very bad. (2606-2608).

The appellees did produce witnesses who testified that the Area was not deteriorating and that it was a safe Area. These witnesses, however, were largely employees of facilities in the Area or had some other vested interest in contending that the Area was not deteriorating. Their testimony, when weighed against the overwhelming testimony of appellants' witnesses, is inherently incredible. (Matlaw 3252-3279, Goodman 3128-3151, Wohl 3213-3250a, Morrison 3384-3404 Schwartz (Mrs.)3405-3442, Jorgensen 3467-3481, Hess 3560-3584, Lawrence 3585-3591, Schwartz (Mr.) 3613-3621, Justiano 3734-3753.)

In weighing the total testimony in the record it appears that the determination of the District Court, that there was no breach of contract to the damage of appellants, was clearly erroneous and should be reversed.

POINT III

THE LACK OF COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT RENDERS THE FEDERAL DECISION IN QUESTION ILLEGAL.

1. INTRODUCTION

The National Environmental Policy Act of 1969, 43 U.S.C. 4321, et seq., P.L. 91-190 (hereinafter "NEPA") places an affirmative duty on each agency of the federal government to consider the national environmental policy in all of their actions. Section 101 of NEPA sets forth the broadly defined national environmental policy. Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972), makes it clear that NEPA "include(s) protection of the quality of the life of city residents" (460 F.2d at 647).

NEPA sets forth several "action-forcing" requirements in Section 102. This section requires that each agency of the federal government shall prepare environmental impact statements in certain situations and shall consider alternative courses of action.

The Department of Housing and Urban Development did not comply with these requirements of NEPA in the processing and consideration of the application of the

New York City Housing Authority to change the designation of Site 30 in the West Side Urban Renewal Area and to fund public housing on this Site. The Trial Court made several points of reversible error of law and should be reversed. The federal government should be required to comply with NEPA prior to any further action at Site 30.

A. ALTERNATIVES WERE NOT CONSIDERED.

The National Environmental Policy Act places the affirmative duty on federal decision makers to consider all appropriate alternatives to a proposed action. If an environmental impact statement is prepared pursuant to Section 102 (2) (C), then sub-part (iii) thereof requires that "alternatives to the proposed action" must be considered as part of the detailed environmental impact statement. Even in the absence of an environmental impact statement, alternatives must be considered. Section 102 (2)(D) of NEPA requires that all agencies of the federal government shall...

> "study,develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources"

The Fifth Circuit has recently commented on the importance of this requirement. It is stated that "clearly,

section 102 (2)(D) is supplemental to and more extensive in its commands than the requirements of [Section] 102 (2)(C)(iii). It was intended to emphasize an important part of NEPA's theme..." that federal projects should not be undertaken unless "intense consideration" is given to the environmental implications of other alternative courses of action. Environmental Defense v. Corps of Engineers, 492 F.2d 1123, 6ERC 1513, 1520 (Fifth Circuit, 1974).

The Council on Environmental Quality's Guidelines (40 CFR §1500, et. seq. 38 F.R. 20550, August 1, 1973) make it clear that there are several different kinds or ranges of alternatives which are encompassed within the NEPA requirements including:

1. Alternative locations;
2. The alternative of taking no action or of postponing action;
3. Alternatives requiring action of a significantly different nature which would provide similar benefits with different impacts;
4. Alternative designs;
5. Alternative measures for compensating or mitigating environmental impacts. (See CEQ Guidelines Sec. 1500.2(b), Sec. 1500.8(a)(4)).

The HUD regulations (HUD Handbook 1390.1, 38 F.R. 19181, July 18, 1973) recognizes the requirement that alternatives be considered and sets forth the kinds of

alternatives recognized by HUD. It requires consideration of:

> "the full array of possible alternatives to the proposal (including those beyond HUD's immediate control) which would significantly alter the environmental impact of the proposed project"

(HUD Handbook, App. C-3, Question I). These regulations recognize the various ranges of alternatives by requiring that alternative sites, locations, sizes and designs be considered. (ibid.)

That the consideration of alternatives is essential to the purposes and intent, as well as to the letter of NEPA has been made clear in numerous cases. See Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C.Cir. 1972); Citizen's Environmental Council v. Volpe, 484 F.2d 870 (10th Cir., 1973); Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2d Cir. 1972); Committee for Nuclear Responsibility v. Seaborg, 463 F. 2d 783 (D.C. Cir. 1971).

There was ample testimony that neither the City of New York nor the federal government considered alternatives to the proposed project at Site 30 as part of the NEPA procedures. The HUD Area office director, the responsible federal official, testified that there was no consideration of alternatives (1324). None of the exhibits produced at

trial by defendants give any evidence of detailed consideration of alternative sites, designs, methods for achieving the desired goals, nor of timing or policy alternatives. No attention was given to the alternative of no action, that is, of not building the project at all.

The Judge committed reversible error of law in his statement that no consideration of alternatives was required (Decision at p. 113) since Section 102 (2)(D) of NEPA requires the consideration of alternatives even where no environmental impact statement is required. Under the HUD regulations, the analysis which is part of the Special Environmental Clearance process must include consideration of alternative sites, sizes and design of the proposed project. (HUD Handbook, App. C-3, Para. J and K, 38 F.R. at 19193). [Special Environmental Clearance procedures are the threshold ones for all urban renewal projects (HUD Handbook, App.A-1) and were used by HUD in the instant case (Second document in Exhibit "E" 1017]

The Trial Court further compounded the error in its argument in the alternative. After erroneously stating that alternatives were not required to be considered because HUD had determined that no environmental impact statement

was required, the Court cites the New York City Housing Authority as stating "in its draft environmental worksheet that, considering the scarcity of available sites and the unmet needs for public housing, there are no alternatives." (Decision at Page 113). Reliance on a "passing mention of possible alternatives ... in a conclusory and uninformative manner afford[ing] no basis for a comparison of the problems involved with the proposed project" must be deemed inadequate. Monroe County Conservation Council v. Volpe, (472 F.2d 693, 696 (2nd Cir. 1972)).

There are alternatives. There are size alternatives, to build a bigger or smaller building; there are location alternatives within and without the West Side Urban Renewal Area (there are many prospective housing projects in the New York City area presently awaiting funding); and there are policy alternatives, such as the rehabilitation of existing housing instead of the construction of new housing.

Under this circuit's doctrine of alternatives as set forth in Monroe County Conservation Council v. Volpe, supra, the Trial Judge's decision must be set aside. In this circuit, the thorough study and detailed description of alternatives is the linchpin of the process of environmental analysis under NEPA. (472 F. 2d at 697-698).

supplement assistance dwellings, contending that HUD failed

B. AN ENVIRONMENTAL IMPACT STATEMENT WAS NOT PREPARED AND SHOULD HAVE BEEN.

1. An environmental impact statement should have been prepared for the whole West Side Urban Renewal Area.

The holding of this Court in the recent case of Conservation Society of Southern Vermont vs. Secretary of Transportation (Docket Nos. 73-2629, 74-2168, 73-2715, December 1, 1974) compels the finding that an environmental impact statement (EIS) must be prepared here covering the whole West Side Urban Renewal Area. Conservation Society held that individual projects must be understood in their broad governmental decision-making contexts. This Court upheld the decision of Judge Oakes, sitting by designation, holding that even though there was no existing plan to develop a whole highway corridor, the possibility of the whole corridor being developed required an EIS to be prepared on the whole corridor (343 F. Supp. 761, D. Vt. 1972). This Court strongly approved Judge Oakes' position that decisions which are segments of a pattern of decisions must not be considered in isolation. This Court affirmed the emphasis on the fact that the environmental consequences of a cumulative series of decisions are not the same as the consequences of individual project decisions. An environmental impact statement covering the larger context

the influx of lower income persons and a deterioration

is required to consider these cumulative impacts.

The Council on Environmental Quality recognizes the particular nature of environmental impacts of a cumulative series of governmental decisions. The CEQ Guidelines observe that the "effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable." (CEQ Guidelines §1500.6). These Guidelines provide for the preparation of an EIS where there is a cumulatively significant effect of governmental decisions (ibid.)

The regulations of the Department of Housing and Urban Development also require the consideration of the cumulative effects of decisions. The HUD regulations note that a "comprehensive project may be composed of, or include, several interrelated activities, e.g., development of a new community or redevelopment of a center city area." (HUD Handbook at Paragraph 5 (a)(5), emphasis added.) In such situations, the regulations require that HUD offices should "concentrate on the broad and cumulative impacts of the larger activity, as well as the project specific impact of component activities". (ibid.)

This circuit has recognized cumulatively important environmental issues in the case of Hanly v. Kleindienst (Hanly II) 471 F.2d 823 (2nd Cir. 1972). In that case, this Court, in setting forth its test of significance relative to

the threshold decision to prepare an environmental impact statement, stated that actions should be examined by the federal agency in light of these cumulative impacts. The threshold decision is at issue here.

The original decisions planning and approving the West Side Urban Renewal Area were taken by the City of New York and the Federal government during the early 1960's Since then, there have been a very large number of decisions causing the delay in completion of the Urban Renewal Plan and causing it to be changed. The decisions approving the change in designation of Site 3 and 4 were made by the Federal government in 1971

These decisions are only a part of a continuum of governmental decisions which have cumulative environmental significance. This continuum includes: the acceptance and quasi-legitimization of squatters in abandoned buildings scheduled for demolition (3170,3172,3184-3185,3206-3207); the tenancy of a number of mixed income buildings by low income tenants above the planned ration of 30% low income - 70% middle income (230, 1701-1702, 3320-3322); the acquiescence in this irregularity by the federal officials, (3354-3356); the introduction of welfare families into apartments designated as middle income apartments (230, 3772, 1864-1872, Exhibits

32, E 541, 46, E651, and 47, E652) These decisions are in the context of government decisions which have not only delayed the completion of the Plan (3784) but have resulted in deterioration of the neighborhood.

An environmental impact statement should have been required to be prepared for the whole West Side Urban Renewal Plan because of the significance of the Plan and because of the cumulative environmental importance of the numerous governmental decisions involved in the redevelopment of the Area. The Federal decision approving the redesignation of Site 30 provides the opportunity for such a study, as it was made after the effective date of NEPA. Businessmen Affected Severely By The Yearly Action Plans v. D.C. City Council, 339 F. Supp. 793 (D.D.C. 1972).

The Trial Court committed reversible error of law in not so requiring. The Court discussed the requirement of and EIS for the Area as being irrelevant (Decision p. 112). In fact, the environmental conditions in the Area, and the instant decision in that context, are what this extensive action is all about.

The Judge committed reversible error of law in his unusually narrow findings relative to the cumulative effects of the Site 30 decision in the context of the whole continuum

of decisions (Decision p. 113). The complex interrelationships of relocation, clearance, renovation, redevelopment, community turmoil, reconsideration and delay have had direct environmental effects on the area. NEPA requires that these complex and cumulative effects be considered. A narrow interpretation of HUD's responsibility in its Site 30 decision-making is contrary to NEPA. (Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972); Silva v. Romney, 473 F.2d 287 (1st Cir. 1973). The Trial Judge's upholding of HUD's simplistic finding of consistency of the City's Site 30 decision with the plan constitutes an erroneous interpretation of law and must be reversed by this Court.

2. An Environmental Impact Statement should have been prepared in connection with the decision at site 30.

The Special Environmental Clearance prepared by HUD (Second document, Exhibit E, E 1017) is inadequate as a matter of law. There are many environmental impacts subsumed within NEPA which were not considered by HUD although they are present and at issue in the Area. The Negative Declaration of HUD, holding that No environmental impact statement was required was based on an incorrect interpretation

of the law: That social issues are not environmental issues within the purview of NEPA.

It was clearly established by the testimony of Messr.s Karlen, (71-133,2614-2628)Fine,(133-170,1285-1371, 1480-1598) Hudgins,(1169-1285) Bromberg (1376-1477,1549-1641) Garcia (1642-1663, 1673-1680) Olnick (1994-2077,2045-2128) Roth,(2242-2253) Sifonte, (1666-;673,2257-2295) Friedberg, (2400-2460, 2755-2796) and Owens, (2553-2613) and Mesdams Sauers, (2304-2334, 2357-2399) and Leibert (1784-1989, 2038-2045) that the facts and situations described demonstrate the serious environmental issues in the Area.

The broad definition of environment required by the law, the cases and the HUD regulations include an extensive range of environmental factors which may be at issue in any particular project decision. The HUD Handbook lists 24 environmental considerations as examples of the kind and range of consideration which may be involved in a particular project. (HUD Handbook, at Paragraph 2(a)).

This broad definition of environment is consistent with several court decisions. For example, Hanly v. Mitchell, 460 F. 2d 640 (2nd Cir., 1972), states at 647:

"The National Environmental Policy Act contains no exhaustive list of so-called 'environmental considerations,' but without question its aims extend beyond sewage and garbage and even beyond water and air pollution. See Ely v. Velde, 451 F. 2d 1130 (4th Cir. 1971); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. Ct., 1971). The Act must be construed to include protection of the quality of life of city residents."

The threshold decision that an Environmental Impact Statement was not required in the instant case is documented. (First page of Exhibit E.1017) This document states that

"it is the finding of this office that approval of this proposal is consistent with all applicable HUD environmental policies and standards, and that the proposed HUD action does not otherwise have a significant adverse impact on the environment in terms described by PL 91-190 [NEPA] and related guidelines of the Council on Environmental Quality.

"Despite the contrary statement by NYCHA [New York City Housing Authority] in their draft environmental clearance worksheet, there is considerable organized opposition to the project, and the urban renewal plan change which enables this development is currently in litigation. It is our understanding that <u>although this opposition is motivated by alleged social impacts of the proposed project, such impacts are not environmental impacts within the context of §101 (b) of NEPA</u>." (emphasis added)

Social dimensions are directly and explicitly included in the NEPA definition of environment. They are included in the HUD regulations. The narrow interpretation of HUD in the instant case is inconsistent with the broad

definition of environment used in this Circuit. (Hanly v. Mitchell, (Hanly I), 460 F. 2d 640 (2d Cir., 1972) cert. den. 93 S.Ct. 313 (1972).

Of the several examples of environmental effects set forth in the HUD Handbook (at Par.2(a)), the following effects were either not analyzed at all or were incompletely analyzed by HUD in their analysis in this case:

Site selection and design
Urban congestion
Overcrowding
Displacement and relocation
Urban blight
Urban growth policy
Urban design
Quality of the built environment
Impact of the environment on people and their activities

In addition to those examples, the following is a list of environmental issues which are directly relevant to environmental quality in the Area and which had to be thoroughly analyzed pursuant to NEPA. They were not so analyzed.

Neighborhood stability
Tipping
Tipping point
Community attitudes
Fear
Urban decay
Crime
Garbage
Noise
Traffic and parking

There is no dispute that many of these issues were not considered adequately. John Maylott, the federal official responsible for the environmental analysis and the person responsible for the threshold decision, stated at trial that the environmental analysis documentation prepared by his office did not cover all facts of urban blight, urban decay, urban design, the quality of the built environment, esthetic values, neighborhood stability, or psychological attitudes and fears (3121-3123).

Harry Foden, a professional with extensive experience with housing and urban development projects (2839), who has prepared major studies on these issues for better than 20 years (2838-2849) and who has been involved with the preparation of numerous Environmental Impact Statements, including one for the John F. Kennedy Presidential Library in Cambridge, Massachusetts, stated that neither the environmental documentation (Exhibit E 1017) nor the site selection criteria (Defendants' Exhibit B 865) considered urban blight, neighborhood stability, community attitudes and fears or social issues regarding the proposed project (2857-2865, 2876).

Examination of material prepared by HUD enclosed in either Exhibit E1017 or Exhibit B 865 , even when read with material supplied by applicant and all of the other disparate material which has been submitted to form part of this exhibit, indicates no consideration being given to these issues.

Because that environmental analysis conducted by HUD surrounding this decision and set forth in the Special Environmental Clearance prepared by HUD does not consider the range of environmental issues which must be considered incident to this project, the analysis is inadequate as a matter of law and the finding based on it is arbitrary and capricious. Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir., 1973), Hanly II,Supra.

The Trial Court incorrectly found the conducted analysis sufficient. It held that because certain environmental concerns are not measurable or quantifiable, they do not have to be considered. However, NEPA itself recognizes that many environmental issues are not easily measurable or quantifiable and, rather then exclude them from NEPA, positively require that they be given attention. Section 102 (2)(B) of NEPA requires that methods and techniques be employed for analysis of unquantifiable effects. For example, aesthetic

concerns may be susceptible of subjective judgements, but they can be environmental although not readily measurable. Similarly, social issues,whatever the subjective judgement, can be addressed, if not easily measured. In urban areas the interplay of social behavior is inherent to the environmental condition. It cannot ignored.

Analysis which ignores social issues must therefore be deemed inadequate as a matter of law.

The analysis of environmental issues purportedly conducted by HUD in this case is a rubber stamp of the material submitted to it by the New York City Housing Authority. It is not an independent analysis of issues as required by NEPA. As such it is not in conformance with this Court's holdings in Greene County Planning Board v. FPC, 455 F2d 412 (2d Cir. 1972) and Conservation Society of Southern Vermont, supra and must be rejected.

POINT IV

THE DOCTRINE OF OTERO V. NEW YORK CITY HOUSING AUTHORITY 484 F2d 1122 IS ECONOMIC AS WELL AS RACIAL AND UNDER IT APPELLEES CREATED A "POCKET GHETTO" AND FAILED IN THEIR "DUTY TO INTEGRATE" WHICH THE TRIAL COURT FAILED TO RECOGNIZE, THUS REQUIRING REVERSAL.

A. THE OTERO CASE

In Otero this Court stated that where the action of a public body (in that case the Housing Authority; in this case the defendants), even, if, in pursuance of its own regulations, is to take steps which will lead eventually to the segregation of an area in violation of the 1968 Fair Housing Act 42 U.S.C. Sec. 3601 et seq. it is acting illegally. So in the instant case by violating the provisions of the Plan to create an integrated community and breaching its contracts with sponsors (see discussion in Point II above) it is creating a situation where the Area will be turned into a segregated ghetto and, under Otero, that may not be done.

B. THE OTERO DOCTRINE APPLIES ON ECONOMIC AS WELL AS RACIAL GROUNDS

In resolving the issue of tipping against appellants, which the court below deemed "The crux of the litigation" in its opinion at p. 54, the District Court committed reversible error. The court concluded that "The concept of tipping is racial and only incidentally

related to income (55)." Thus, held the District Court, because appellants maintained that "The true characteristic [of tipping] is the low income of the families involved (55)" and because the court could not apply tipping "in economic terms", it refused altogether to apply that concept to this case. As demonstrated below, the conclusions of the District Court are based upon a superficial analysis of the concept of tipping and a failure or refusal to consider the fundamental sociological principles of the concept which underlie its judicial acceptance in Otero.

Tipping is neither solely a racial nor an economic concept; it is a conceptual warning that when a given concentration of low income minority people within a community is reached, the majority will depart and the community will deteriorate. With respect to concentrations within public housing, an increase of low-income tenants, mostly non-white, increases racial concentration and fosters segregation. Otero v. New York City Housing Authority, 484 F2d at 1135; Shannon v. HUD, 436 F2d 809 (3d Cir. 1970); Banks v. Peck, 341 F. Supp. 1175 (N.D. Ohio 1972); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971).

In Otero, while plaintiffs were "mostly non-white" former site occupants (484 F2d at 1126), the issue before

the court was whether a particular tenant assignment policy which excluded plaintiffs from residency in a housing project was constitutionally valid. In finding the existence of a genuine issue, which precluded summary judgment, this court acknowledged that a tenant assignment policy which would lead to an "eventual ghettoization of the community" must be disregarded (484 F2d at 1136).

In Otero the subject of the assignment policy was a racially identifiable group; this apparently led the court below to conclude that the concept of tipping only applies on a racial basis. However, neither Otero nor the "line of authority" which preceded Otero, and which was cited by the District Court at p. 57, nor the numerous sociological studies of tipping support the application of the concept on an exclusively racial basis. In Shannon v. HUD, supra, plaintiffs sought to prevent the execution or performance of a contract for rent supplement payments for a low-income housing project on a certain urban renewal site which would have the effect of increasing the already high concentration of non-whites in the area. Even though the race of the prospective low-income tenants was not known, plaintiffs challenged the change in the urban renewal plan from one which contemplated owner occupied dwellings to low-income rent

supplement assistance dwellings, contending that HUD failed to consider the segregative (i.e., tipping) effect of the change.

The Third Circuit agreed. In holding that HUD must consider the effect of a site selection decision, the circuit court made no distinction between a concentration of low-income tenants and a concentration of non-white tenants (436 F2d at 820-21).

Similarly, no distinction between economics and race was made in Banks v. Peck, supra or in Crow v. Brown, supra, both suits challenging low-income housing project selections. The remaining authorities relied upon by the District Court at p. 57 are also silent regarding racial and low-income distinctions.

Thus, there exists no judicial authority to support the determination of the court below at page 57 that tipping has been "recognized only as a racial issue." And, when the sociological principles underlying tipping are examined, the error of this determination appears even more glaring.

One of the earliest studies of residential housing patterns was made in 1958 by the sociologist Martin Grodgins. Grodgins observed that the root cause for the middle-income exodus from the inner cities was

the influx of lower income persons and a deterioration of the communities. In startling contradiction to the conclusion of the District Court, Grodgins found that the attributes leading to neighborhood deterioration and middle income flight are identified with lower income behavior, which is only incidentally related to skin color. See M. Grodgins, The Metropolitan Area as a Racial Problem 10-15 (U. Pittsburgh 1958)

Other sociologists have come to the same conclusion: It is the influx of low income persons, not merely non-white persons, which causes tipping. See K. and A. Taueber, Negroes in Cities 2 (Aldine 1965); K. Clark, Agenda for the Nation 131 (Brookings Inst. 1968); Piven & Cloward, "The Case Against Urban Desegregation", 12 Social Work 12, 14 (1967).

The final error of the District Courts' refusal to apply the tipping concept to an increase of the low-income population in the Area, is its failure to recognize the realities of such an increase. In an inner city housing project, to speak of low-income, is to speak of non-white (263-264, 300-307, 2526-2530); an increase of the low-income population is tantamount to an increase of the non-white population. See National Commission on Urban Problems, Rebuilding the American City 43 (Praeger 1969); Report of the National Advisory Commission on Civil

Disorders 236 et seq. (Bantam 1968). Note, "The Benign Housing Quota", 42 Fordham L. Rev. 891, 896 (1974).

Apart from the racial realities of an increase in low-income residents it becomes obvious that the true factor to be considered in evaluating tipping is the low-income nature of the families involved; the racial element is only a concomitant -- not a distinguishing element. (There are many middle income non-whites that are not associated with a decline of the inner city, viz. the witnesses Hudgins (1169-1285), Owen (2553-2613), Justiano (3734-3753), Sifante (1666-1673, 2257-2295) and Garcia (1642-1663, 1673-1680).) Thus, as Dr. Kristof testified, tipping involves racial and economic aspects which are correlative (2526-2530); the attempt of the District Court to label tipping "a racial issue" was an egregious error which should be reversed by this Court.

C. POCKET GHETTO

In Trinity as in Otero there is, in addition to a situation which would lead to non-white segregated community, the further danger of creating a "pocket ghetto". (See opinion of this Court in Otero 484 Fed 2d 1122 at p. 1135.) The conversion of Site 30 from middle to low income housing would cause a concentration of three public housing projects on one block (the Trinity block

91st) with a total of 727 units of low income units over and above the 30% low income units in Trinity's Site 24 of 57 units, the 20 units of low income in Site 31 St. Martin's Towers and the 56 units contemplated for Site 28 Heywood Broun Towers making a total of 860 units of low income housing out of a total of 1,000 units on 91 Street or more than an 80% concentration of low income units. The specific area of the pocket ghetto is both sides of the 91 Street block between Amsterdam and Columbus Avenues, including the projects on the Northeast and Southeast corners of Columbus Avenue. This is exacerbated by the proximity to Leader House, Columbus Manor and Westwood House (which are only one block away) with their concentration of low income units (Exhibit S, E1124). This is indeed the type of concentration which leads to the pocket ghetto discussed in Otero. The 91st Street block already is a pocket ghetto.

In declaring that the pocket ghetto situation which was not permitted in Otero does not exist in Trinity, the District Court in the opinion at pages 89-91 after conceding that the selection of 91 Street is not an unreasonable assumption, criticizes appellants' argument on the ground that the delineation of the critical area as being on 91 Street between Amsterdam

Avenue and Central Park West has not been established as the correct one. The Court speculates that other blocks might be taken and they would establish lower concentrations.

But the blocks selected contain not only Site 30 but the Trinity project as well, both of which are the subjects of this litigation. Therefore it is sound to select these blocks -- particularly because there is no issue that the blocks selected contain a concentration of over 80% low income units which Otero held to be impermissible.

It is equally unsound to question as the Trial Court does at pp. 90 and 91 of its opinion whether the 399 units in Stephen Wise Towers are low income. It is a public housing project created by the New York City Housing Authority which can only develop low income housing.

Finally appellants' proof on the tipping of the Area buttresses the pocket ghetto aspect of the situation and the Trial Court was "clearly erroneous" in holding that we failed to prove that the pocket ghetto would lead to the tipping of the Area.

D. THE DUTY TO INTEGRATE (TIPPING)

Otero enunciates the doctrine that there is a "duty to integrate" in developments of this type and that duty hinges on whether the "tipping point" has been

reached or breached. We have established that the present policies of the government are responsible for the deterioration of the Area which in turn is leading to tipping. This will essentially undermine the Plan's objective to maintain an integrated and balanced community and will lead to its becoming a segregated slum thereby depriving appellants and the other sponsors of their rights under their contracts.

The Trial Court in holding that tipping would not occur incorrectly computed the number of low income units presently in the Area and failed to correctly evaluate the testimony of appellants' witnesses testifying to the "deplorable" conditions existing there.

Analysis of the census figures adduced by Dr. Frank Kristof support appellants' contentions, rather than counteract appellants' argument as to tipping as the Trial Court held. (Opinion pp. 63-67)

The Trial Court overlooks the fact that all parties agree that there was no sign of tipping in the Area between the 1960 and the 1970 census. Indeed a bulwark of our argument is that the Area was distinctly

on the upgrade during those years and there was no sign of tipping. That was why Trinity was willing to commit itself finally in 1968 to stay in the Area and expend or obligate itself for in excess of $9,000,000. Deterioration only occurred beginning in 1970 with the advent of the squatters and the change in attitude towards the Plan by the City, as a result of pressure by politicians and other extreme groups which resulted in the breaches of contract by the City that gave rise to this action. (223-230, 600-603)

Kristof's testimony was that the Area would tip with the large influx of low income families presently there and planned for the future by the City (2513-2531).

His testimony that the West Side community from 59th Street to 110th Street is strong and stable merely means that it is basically a sound integrated community, which is exactly what the Plan was formulated to preserve and what attracted the host of people who came into or stayed in the Area. People and institutions made substantial investments of money because they sought stable, integrated neighborhoods. Kristof is saying,

however, that even despite its strength, the Area will tip if it is overloaded as at present and as is being planned by the City in the future. We argue that the massive infusion of low income families, in breach of the City's contractual obligations, is causing tipping. This is Kristof's opinion; (see also Starr 263, 264, 301-303).

Neither Kristof nor anyone else was able to give statistics adverse to the Appellants' point of view dealing with the situation in the Area between 1970 and 1974 when we do claim the danger of tipping became a problem. All proof during this time period comes from witnesses' direct observations as discussed in Point II above.

In evaluating the Community involved (p.63-72 of its opinion) the Trial Court referred to statistics affecting the entire West Side and for the period prior to 1970. It is clear, however, that these statistics are useless in evaluating the community as it exists now and has existed since the squatters and welfare families came in after January 1, 1970. The issue in the case is the situation now -- not prior to 1970. The

squatters and welfare families are there now. Appellants' testimony is about conditions as they exist now and there are no statistics available for the period from 1970-1974.

In its analysis of the number of low income units currently in the Area the Trial Court at pp 67-69 of its opinion found 2046 units whereas Appellants contend there are now approximately 3300 units. The difference in these figures comes about as a result of the Trial Court eliminating three of the categories included in Appellants' computations (1) 284 squatter families, (2) the 517 units of low income housing on the perimeter of the Area and (3) the 601 families in Leader House, Westwood House and Columbus Manor.

It is submitted the Trial Court was wrong in eliminating these items.

The Trial Court eliminated the 284 squatter families on the ground that they are "not permanent residents and will be removed as the buildings which they occupy become ready for demolition." But they are concededly there now and are creating havoc with the entire neighborhood as the testimony of witness after witness has established on the trial. It is unreasonable

to argue that they must be disregarded as being non-existent, as the Trial Court would do - particularly since they had been there for four years at the time of the trial, a year ago. But, more importantly, if we count from the time they are relocated (if they can be at all, in view of the current political attitude of the City to the groups that put them there in the first place) we must then evaluate the number of low income families who will be in the Area. As we have shown after the remainder of the Plan is completed there will be over 3700 low income families on the site after the squatters and excess welfare families are relocated. Thus the Trial Court was clearly erroneous in eliminating the squatters from its calculations.

The Trial Court was equally in error in eliminating the 517 units of perimeter low income housing projects. Fried testified (574-581, 688-697, 913-915) that they were included in the 2500 units fixed by the City and it was established in Exhibit 45, E650 and at pages 574-575 of the record that they were on frequent occasions announced to be included. Moreover, there is not one iota of testimony adduced by Appellees

which establishes anything to the contrary. Thus the Trial Court was in error in stating at p.68 of its opinion that the "perimeter projects should not be included in the calculation" and particularly by the non sequitur which follows to the effect that "this is consistent with our finding that perimeter projects were intended to provide housing to dislocated Area residents for whom housing was unavailable in the Area proper".

As to the 601 units in the three 236 projects they were included as low income because of the narrow band of eligibility available under the Federal Section 236 Income Limits which preclude middle or moderate income families like Civil Service workers from qualifying for them. If we do not count 100% of the 236 projects occupancy as low income and allow only 50% which Appellees and the Trial Court concede (Opinion p.68) we still get a total figure for low income families of about 3000 which, in any event, is far in excess of the 2,500 units fixed by the City.

Thus, based upon the concept of the Otero case, the District Court should have acted to restrain the violations of the Plan by the government agencies and its failure to do so calls for reversal.

POINT V

THERE IS NO NEED TO EXCEED THE LIMITATIONS OF LOW INCOME UNITS PROVIDED FOR IN THE PLAN AND CONTRACTS IN ORDER TO TAKE CARE OF THE LEGAL RELOCATEES.

The original figure of 2,500 low income units represented a sound estimate of the number of such units that would be necessary to take care of all the legal relocatees who would seek to remain in or be relocated back into the Area. No change has occurred in that need since that estimate was made; thus, the need is being adequately met by the number of low income units already in the Area and those contemplated to be built in the future.

Of course, if the City and Strykers Bay use the Area as a dumping ground by importing welfare families from other parts of the City who are not relocatees as it has done and is doing, the number of low income units will not be sufficient. (2002-2018, 2099)

POINT VI

THE CITY VIOLATED THE PROVISION OF LAW AND OF ITS CONTRACTS WITH SPONSORS IN THE MANNER IN WHICH IT PROCESSED THE CHANGES IN THE PLAN.

A. THE PLAN CHANGE

A change in the nature of the use in an Urban Renewal Plan is a major change requiring a formal plan change which must be processed and approved by the New York City Housing and Development Administration, the New York State Commissioner of Housing and Community Renewal, the Federal Department of Housing and Urban Development, the City Planning Commission and the Board of Estimate.

No formal change was effectuated by the City in connection with the conversion of Sites 4 and 30 from middle to low income housing. What the City did do was to process for approval of a "plan and project" under Section 150 of the New York Public Housing Law (McKinney's Consolidated Laws of New York, Vol 44A) which is a different procedure for a different purpose than the procedure for a formal plan change of the Urban Renewal Plan. A formal plan change is governed by Article 15 of the New York General Municipal Law (McKinney's Consolidated Laws of

New York, Vol 23) with particular reference to Sections 505 and 514 and the National Housing Act of 1949 P.L. 81-171 Sections 105 (a) and (d).

The procedure set forth in Public Housing Law Section 150 (which was followed by the City here) deals with the approval necessary for the development of a public housing project whether it be in an Urban Renewal Area or not. The procedure prescribed by General Municipal Law Section 15 and the National Housing Act of 1949 Sections 105(a) and (d) deals with changes in an urban renewal plan, which is what we are concerned with in this case and which was not followed by the City in connection with the change in the Plan of Sites 4 and 30 from middle to low income housing. (See Exhibit B, E865 under subdivision i specifying the procedures requires for a plan change.)

The following steps were required but were not performed:

(a) There has been no approval from the New York State Division of Housing and Community Renewal pursuant to General Municipal Law Article 15 Section 514;

(b) There has been no written (or oral either) consent to the plan change from any of the affected sponsors in the Pilot Project Area whose written consent was required by their contracts. (see Item B below)

(c) There is no resolution of the Housing and Development Administration of the City of New York adopting the plan change;

(d) There is no resolution of the Board of Estimate approving the plan change;

(e) The change was not processed through the Federal Department of Housing and Urban Development for approval as a plan change as distinguished from the approval of a public housing project.

The City itself has always, in the past, interpreted this type of change as a plan change in the four changes which were processed between 1963 and 1966. Exhibits 11, E122, 15, E417, 16, E 423, 17, E425, 18, E 428, 19, E 429, 20, E431, 34, E 543) and Starr and Fried, both experts on urban renewal processing, characterized the situation as requiring a major plan change. (425,937).

It was no accident that these four prior formal major plan changes were processed as they were - the law required it. But with the changed attitude of the City Administration toward the Plan beginning in 1970 they disregarded the requirements of law and failed to process the changes in Sites 4 and 30 (as required and as they had done previously) and failed completely to take any of the steps prescribed for a plan change.

The change is a profound one which, combined with the other violations of the Plan by the defendants, is having the effect of emasculating the entire Plan and destroying the investment running into hundreds of millions of dollars of public and private funds.

Moreover, where a change in use occurs in an urban renewal plan (such as the change in this case) the government is required by San Francisco Tomorrow v. Romney, 472 Fed 2d 1021, 9th Cir, 1973 to make an environmental study under the National Environmental Protection Act. Thus, by failing to present the plan change to the Federal Government for approval when the use designations of Sites 4 and 30 were changed by the City no environmental study was made, as required. The fact that the Federal Government did make an environmental study later as to the public housing funding of Site 30 does not cure the defect since the later study only involved consideration of a public housing project (Site 30) and did not involve an environmental study of the impact of a plan change upon the entire Urban Renewal Plan for the Area. (see discussion in Point III above)

In discussing "The City's Approval of the Conversion of Sites 4 and 30) (to public housing), the Court notes at p. 114 that defendants concede that they processed the approval of the changes pursuant to the wrong law, i.e., they proceeded under Public Housing Law Section 150 instead of General Municipal Law Article 15, Sections 505, 514 and National Housing Act of 1949 Sections 105 (a) and (d). The Court concludes, however, that the incorrect procedure followed would not "have in any way resulted in the use of different criteria, let alone a different conclusion." However, the correct law (General Municipal Law and National Housing Act) required inter alia approval of the State Commissioner of Housing and Community Renewal, which was not obtained. The Court attempts at p. 119 of its opinion to justify this failure on the ground that Lee Goodwin, the present Commissioner, now has no objection to the change. In fact one of her predecessors, James Wm. Gaynor, did express his disapproval of the change and so testified for the plaintiffs on the trial. (2732-2752) In fact the Commissioner at the time the changes were processed was Charles Urstadt who did not testify on the trial. It is most inappropriate for political and social judgments of temporary occupants of

government positions to be allowed to vitiate the contractual rights of sponsors who entered into their contracts in good faith.

The Court also notes that the Plan itself contains provisions that all changes must be approved by the local governing body and certain findings made. These findings were not made. It was error for the Court to excuse this failure solely on the ground that "no issue of improper land acquisition is involved." The entire issue of a change in the basic concept of the Plan is involved, and was not considered or acted upon as required by the relevant statutory provisions to the serious injury of appellants and other sponsors similarly situated.

Consequently, the District Court's decision in this respect should be reversed as a matter of law.

B. WRITTEN CONSENT

Tied in directly with the procedure for plan changes discussed above are the procedures for written consent by owners and lessees in the Pilot Project Area to plan changes.

When the Final Urban Renewal Plan (Exhibit 22, E433) was approved in 1962 it contained a provision requiring

consent to any plan changes by owners and lessees under the Plan. The clause then in effect provided as follows:

> "A. Changes in Approved Plan
>
> This Urban Renewal Plan may be modified at any time by the City of New York provided that, if modified prior to the termination of the Government's financial obligation under the Capital Grant Contract, such modification be concurred in by the Housing and Home Finance Agency, and provided that if any such modification affects any real property previously disposed of by the City of New York, written consent to such modification must be obtained from the purchaser or lessee of such real property." (emphasis added.)

The rationale for this provision was that a sponsor who acquired property under the terms of an approved urban renewal plan was entitled to pass on changes which would affect his sponsorship. Thus, a sponsor of a fine residential property was entitled to a veto over the idea of changing the plan to substitute a public housing project.

However, laudable as was its purpose, the clause gave rise to difficult problems when plan changes were needed and consent proved difficult to obta[illegible] As a result the clause quoted above was modified to the form presently in the latest amendment to the plan which only

requires the consent of the owner whose parcel is involved in the change. The current clause, contained in Exhibit 14, E 157 (at page 28 of Schedule C-1 Amended Urban Renewal Plan Fourth Revision), provides as follows:

> "F. Changes in Approved Plan
>
> This Urban Renewal Plan may be modified at any time by the City of New York, provided that if modified after the disposition of any land in the project area such modification must be consented to in writing, by the purchaser or lessee or their successors in interest of the specific property conveyed by the modification. This shall not be construed to require the consent of the purchaser or lessee or their successors in interest of any other parcel in the project area."

However, although the quoted change eliminated the need for written consent of other sponsors in the Area the need for written consent was not changed as to owners and lessees in the Pilot Project Area and the need for such consent remains effective to this day. It is contained in Exhibit 14, E157 at page 17 of Exhibit D, "Final Plan for the Rehabilitation Demonstration Pilot Project" and provides as follows:

> "R. Changes in Approved Plan
>
> This Final Plan may be modified at any time by the City of New York, provided that if

> any such modification affects any real property previously disposed of by the City in the Pilot Project area, written consent to such modification must be obtained from the purchaser or lessee of such real property."

Thus, for any change in the Plan which affects purchasers or lessees in the Pilot Project Area written consent is required, but the City concedes that no such consent was ever obtained from Karlen and Hudgins, in the Pilot Project Area.

We have established above that the change of Sites 4 and 30 from middle to low income housing is a change in the Plan which requires the processing of a plan change as defined by law. Consequently, the written consent under the quoted clause of all purchasers or lessees in the Pilot Project Area whose property is affected, is required.

The boundaries of the Pilot Project Area are clearly defined in the Pilot Project Plan in Exhibit A annexed to the Pilot Project Plan annexed to Exhibit 14, E 157 and includes the brownstones on 94th Street owned by appellants and other sponsors whose consent was not obtained. (See also the map showing the boundaries of the Pilot Project Area, Exhibit 14, E 157 Exhibit D Final Plan Map

Number 5)

The change of Sites 4 and 30 from a middle to a low income use affects the real property of all purchasers or lessees in the Pilot Project Area and the City admits that no written consent was obtained from any of them (3201).

Appellant Karlen who purchased a brownstone from the City in the Pilot Project Area (34 West 94th Street) in 1968, testified that he was adversely affected by the change in use of Sites 4 and 30 since that resulted in the tension which developed in the Area and its deterioration. His property also suffered a loss in value, and in addition there was an increase in fear and a depreciation in environmental quality. (71-133, 675, 2614-2628)

Thus, it is apparent that the City has violated the Plan in that it has failed to obtain the written consent of the purchasers or lessees in the Pilot Project Area who are affected by the Change of Sites 4 and 30 from middle to low income housing.

The District Court held at pages 51-53 of its opinion that the written consent of purchasers or lessees in the Pilot Project Area was not required to the changes in the Plan, despite the specific provisions of Section R of the Pilot Project Plan calling for such a "written consent", and in spite of the City's concession that no such consent was sought or obtained. In so holding, the Court stated that while Section R is inconsistent with Section F of the Plan, the provisions of Section F must prevail since the contracts provide in Section 405 that the provisions of the Plan, as amended, shall govern.

However, the provisions are not inconsistent and can easily be read together to require the written consent of those in the Pilot Project Area but no consent from other sponsors, not located in the Pilot Project Area and consequently Section 405 of the contracts has no applicability.

Both the Amended Urban Renewal Plan and the Pilot Project Plan are annexed to all the sponsoring contracts (see for example Exhibit 14, E 157) and are made part of it as a total agreement. Thus, they must all be read as a whole and interpreted consistently. Wood v.

Sheehan, 68 N.Y. 364.

See also In re Brooklyn Trust Co., 163 Misc. 117, 295 N.Y.S. 1007, 1015 (Sup. Ct. Kings Co., 1936).

The law is clear that where two provisions can be read consistently with each other (as these can) they must be so interpreted. Nau v. Vulcan Rail & Const. Co., 286 N.Y. 195, 197 (1941); Jones v. Crawford, 3 App. Div. 2d 479, 162 N.Y.S. 2d 41, 44 (4th Dep't, 1957); Eagar Const. Corp. v. Ward Foundation Corp., 255 App. Div. 291, 7 N.Y.S. 2d 450, 452 (1st Dep't 1938).

The Court at page 53 characterizes this interpretation as "untenable" because it would have a different effect on sponsors depending on whether they are located in the Pilot Project Area or not. But this is what the contracts categorically provide and there is no basis for the Court to modify these unambiguous provisions even though they do affect different sponsors in the Area differently.

Thus the District Court erred as a matter of law in holding that the written consent was not required and its decision in this respect should be reversed.

CONCLUSION

Appellants and those on whose behalf they speak believe strongly in and have acted upon their expressed desire to live and bring up their children in an integrated community. Those who remained in the Area could have fled if they wished to shun contact with minorities. And, certainly, those who voluntarily moved in did so because they wished to demonstrate by their own actions that they believed in the principle of heterogeneous neighborhoods.

This concern was so deep that when it appeared that the Area might tip and become another segregated slum, they still did not flee but chose, instead, to meet the problem head on by taking whatever kinds of action were available to them: they formed groups and held meetings; contacted government officials personally or through letters; demonstrated, printed a newsletter, sought contributions to carry on the fight; and, ultimately, instituted this action as a last resort, to ask the Court for relief for the wrongs being committed against the community.

Hundreds of millions of dollars of public and private funds have been invested in upgrading the Area and preventing it from "going down the drain" -- as the black witness Miles Owens so eloquently testified.

Beyond the huge sums of money involved are the aspirations of men and women of good will toward achieving the good life for themselves and their families in the kind of balanced, integrated community which is one of the ways New York City can be saved.

Now, while there is still time to restore the Plan to its original concepts, it is appropriate for this Court to reverse and grant the relief sought by appellants.

Respectfully Submitted,

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Dated: February 19, 1975

Of Counsel
Eugene J. Morris
Martin Stuart Baker

Received 2 copies of the within
Appellant Brief
this 20 day of Feb, 1975.

Sign _____

For: Louis J. Lefkowitz Esq(s).

Att'ys for State of New York

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Received 2 copies of the within
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this 20 day of Feb, 1975.

Sign _____

For: Adrian Burke Esq(s).

Att'ys for City of N.Y. Appellee

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ATTORNEY GENERAL

Received 2 copies of the within
Appellant Brief
this 20 day of Feb, 1975.

Sign _____

For: Martin T. Morgan Esq(s).

Att'ys for Intervening Defendant Appellee

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